In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 111

DEPARTMENT OF MENTAL HYGIENE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

EVELYN KIRCHNER, Administratrix of the Estate of ELLINOR GREEN VANCE,
Respondent.

Brief for the Petitioner

On Writ of Certiorari to the Supreme Court of the State of California

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OPINIONS BELOW

The opinion of the Supreme Court of the State of California (R. 52-59) is reported at 60 Cal. 2d 716; 388 P.2d 720 (1964). The previous decision of the District Court of Appeal (R. 26-35) is reported in 29 Cal. Rptr. 312 (1963).

JURISDICTION

The judgment of the Supreme Court of the State of California was entered January 30, 1964 (R. 52). A petition for Rehearing was filed on February 14, 1964 (R. 59-106) and was denied on February 26, 1964 (R. 114) without opinion. Petition for a writ of certiorari was filed on May 21, 1964 and was granted October 12, 1964. The jurisdiction of this

Court rests on 28 U.S.C. 1257(3) since the validity of a state statute has been drawn into question on grounds of repugnancy to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

QUESTIONS PRESENTED

1. Is a statute requiring the husband, wife, father, mother or children of a patient in a state mental hospital to pay for the cost of treating said patient, within reasonable standards of financial ability, so purely arbitrary and devoid of rational basis as to violate the Equal Protection Clause of the United States Constitution?

2. When a state supreme court decides a case on an important constitutional ground, neither raised at trial, or on appeal, nor briefed or argued by either party, has the losing party been denied due process of law within the meaning of *Saunders v. Shaw*, 244 U.S. 317 (1917)?

STATUTES INVOLVED

The primary statute concerned in this case is California Welfare and Institutions Code section 6650, which provides, in part,[1]

> "The husband, wife, father, mother or children of a mentally ill person or inebriate, and the administrators of their estates, and the estate of such mentally ill person or inebriate, shall be liable for his care, support and maintenance in a state institution of which he is an inmate."

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1. The full text of Welfare & Institutions Code § 6650, §6651 (qualifying § 6650 liability by ability to pay), § 6653 (requiring investigation of financial condition of patient and relatives), § 6655, Civil Code § 1432 (right to contribution), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, all of which are here involved, are printed in full in Appendix A.

STATEMENT OF THE CASE

Auguste Schaeche has been a patient at a California State Mental Hospital since January 15, 1953. The Department of Mental Hygiene of that State brought this action against the estate of Ellinor Green Vance, a deceased adult daughter of Auguste Schaeche. The purpose of the suit was to obtain reimbursement in the sum of $7,554.22 for the care provided to Mrs. Schaeche for the four years preceding her daughter's death, on August 25, 1960 (R. 1-3).

Evelyn Kirchner is the duly appointed administratrix of the estate of Ellinor Vance (R. 2-3), as well as its principal beneficiary. She is also the guardian of the estate of Mrs. Schaeche, the incompetent (R. 15). Acting as administratrix of the daughter's estate, Evelyn Kirchner rejected the creditor's claim filed by the Department of Mental Hygiene (R. 3), but, as Mrs. Schaeche's guardian, offered to pay the claim out of the assets of the incompetent (R. 9-10). These assets, $10,903.35, now held in escrow, were derived from the sale of the patient's realty. At the time of Mrs. Kirchner's offer to pay from these assets they were subject to an equitable lien in favor of the Department of Mental Hygiene in the sum of $6,425.00 for accrued charges for care of Mrs. Schaeche for the period ending September 30, 1958, and for other sums that had become due after September 30, 1958 and would become due in the future (R. 9). The latter sums then owing together with the original sum of $6,425.00 exceed the assets of the guardianship estate (R. 17).[2] Hence the Department of Mental Hygiene did not agree to accept payment from the respondent guardian,

2. There is an overlap of about two years in the claim against the estate of the deceased daughter and the period of the ascertained amount of the equitable lien against the patient's assets, i.e., August 25, 1956, to September 30, 1958. A substantial portion of the $6,425.00 is for a period prior to August 25, 1956, for which suit would otherwise be barred by the statute of limitations. (Code Civ. Proc. § 345) There is also due from the guardianship estate costs of care for the period after August 24, 1960.

since to do so would impoverish the patient. Action therefore was filed against the respondent as administratrix of the Estate of Ellinor Green Vance, a responsible relative as defined by Welfare & Institutions Code section 6650 (R. 1-4).

By demurrer and then answer, the respondent asserted that the estate of the deceased daughter had no liability until the patient's own assets were totally exhausted (R. 4, 9). Nevertheless, no attempt was made to bring in the incompetent's estate as a party defendant. With the dispute thus limited to the single issue of priority both parties moved for judgment on the pleadings (R. 19, 20). The Department of Mental Hygiene's motion was granted and respondent's was denied (R. 23). On appeal, the District Court of Appeal affirmed (R. 26-35), but the Supreme Court of California reversed (R. 52-59).

SUMMARY OF ARGUMENT

In this case the California Supreme Court held a state statute unconstitutional on the ground it violated the Equal Protection Clause. The statute imposed an obligation on close family members to contribute within their means toward costs of care for patients in state mental hospitals. Petitioner urges that the Constitution of the United States does not demand that a state bear the full cost of supporting the mentally ill in its hospitals.

The court's holding that for this purpose the classification is without rational basis disregards the long history of this obligation. These parental and filial duties, enforced in the civil law countries since early Roman times, have been part of the common law since 1601. Some forty-two states and the District of Columbia have statutes similar to that of California. Those courts which have considered the question have found the classification herein to be reasonable for

civil commitments, e.g. *Beach v. District of Columbia*, 320 F.2d 790 (1963), *certiorari denied* 375 U.S. 943. An obligation so firmly implanted in Anglo-American jurisprudence cannot be said to be purely arbitrary.

The court's own language compels the conclusion that it has undertaken to decide the wisdom of legislation rather than its constitutional validity. The decision itself relies on discredited authority and inappropriate analogies.

The court's holding is based on its mistaken notion that the public is the primary beneficiary because those confined are, like criminals, a danger to society as a whole, a point of view long since discarded.

The statute has for its purpose a proper government objective: to defray in part the cost of the state's mental health program. Selection of the class here is reasonable since the close family members derive a greater benefit from the state program than does the public as a whole.[3]

I.

FOR THE PURPOSE OF PARTIALLY RELIEVING THE STATE OF THE BURDEN OF CARING FOR THE MENTALLY ILL, A STATUTE IMPOSING LIABILITY UPON A CLASS LIMITED TO CLOSE FAMILY MEMBERS IS NOT ARBITRARY AND THUS IS NOT A DENIAL OF "EQUAL PROTECTION OF THE LAWS."

A. The Imposition of This Liability on Patients and Close Relatives Has a Legitimate Purpose: That of Partially Relieving the State of the Cost of Caring for the Mentally Ill.

California Welfare & Institutions Code section 6650 (section references will be to this Code unless otherwise in-

3. The decision below has aroused uniformly critical comment by the law reviews. See 77 Harv. L. Rev. 1523 (1964), 49 Cornell L.Q. 516 (1964), 16 Hastings L.J. 129 (1964), 39 Notre Dame Law. No. 5 (1964), 40 Nor. Dak. 202 (1964), 39 N.Y.U. L. Rev. 858 (1964). This last Comment is printed in full as Appendix B.

dicated) imposes a joint and several liability on the patient's estate, husband, wife, father, mother or children and upon the administrators of their estates for the cost of care, support and maintenance in a state institution. Some forty-two other states and the District of Columbia have similar statutes (R. 91-92). Their purpose is clear. In *Dept. of Mental Hygiene v. McGilvery*, 50 Cal. 2d 742, 755; 329 P.2d 689 (1958), the California Supreme Court recognized that:

> "The obvious purpose of the particular provisions of the statute here involved [§ 6650] is to minimize the cost to the state and its agencies in providing assistance to the needy and distressed by exacting contributions from persons standing in close relationship to those assisted."[4]

See also *Estate of Setzer*, 192 Cal. App. 2d 634, 637; 13 Cal. Rptr. 683 (1961).

The Legislature never intended to provide care and maintenance without charge to persons having assets of their own, or having close relatives with resources. *Estate of Lackmann*, 156 Cal. App. 2d 674, 676-677; 320 P.2d 186, 188-189, (1956); *Dept. of Mental Hygiene v. McGilvery*, 50 Cal. 2d 742, 755; 329 P.2d 689, 695 (1958); See also *Bertch v. Social Welfare Dept.* 45 Cal. 2d 524, 530; 289 P.2d 485, 489 (1955).

The court below now has declared the legislative purpose improper under the Federal Constitution. It has decreed that the state is obligated under the Constitution of the United States to bear the full cost of support for the mentally ill except where it may recover from the patient's estate. Heretofore the matter of extending, expanding, cur-

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4. That it accomplishes this purpose is manifest from the estimate of the Department of Mental Hygiene that collections from the relatives total over five and one-half million dollars annually (R. 97).

tailing or withdrawing public assistance and apportioning the burden thereof has been recognized as one of public policy only, as one for the legislature rather than the courts.

The California Supreme Court so held in *Estate of Yturburru*, 134 Cal. 567, 568-569; 66 Pac. 729 (1901):

> "(T)hese institutions for the insane are charitable only so far as the legislature makes them so. There is nothing in the Constitution inhibiting laws extending charity to people in need of it, but it is not necessary to extend charity to those who are able to support themselves; indeed, it would be unreasonable to do so."

As recently as 1958 the same court said in similar vein,

> "In this humanitarian age the state has assumed that obligation [support in mental hospitals] in the absence of the parent's ability to do so. This fact has not, however, entirely abolished the parental obligation. It has done so only to the extent provided by statute." *Dept. of Mental Hygiene v. McGilvery*, 50 Cal. 2d 742, 753; 329 P.2d 689, 694 (1958).

Courts of other states with statutes similar to that of California have approved and found legitimate the legislative purpose implicit in these statutes. E.g., *Kough v. Hoehler*, 413 Ill. 409, 419; 109 N.E. 2d 177, 182 (1952); *In re Idleman's Commitment*, 146 Ore. 13, 22; 27 P.2d 305, 308-309 (1933); *Kaiser v. State*, 80 Kan. 364, 371; 102 Pac. 454, 457 (1909); *Acting Commissioner of Mental Hygiene v. Williamson*, 330 Mass. 52, 54-55; 110 N.E. 2d 916, 917 (1953); *People v. Hill*, 163 Ill. 186, 189-190, 46 N.E. 796, 798 (1896).

It is clear from statements in its opinion that the court below disapproved of the purpose and in invalidating the statute took upon itself the task of deciding the wisdom of the legislation. The court said:

"We need not blind ourselves to the social evolution which has been developing during the past half century; it has brought expanded recognition of the *parens patriae* principle . . . and other social responsibilities, including . . . divers other public welfare programs to which all citizens are contributing through presumptively duly apportioned taxes . . . From all of this it appears that former concepts which have been suggested to uphold the imposition of support liability upon a person selected by an administrative agent from classes of relatives designated by the Legislature may well be re-examined." (R. 57-58)

Certainly the extent of development of the "social evolution," the scope of the "*parens patriae* principle" and "other social responsibilities" are matters not dictated by the Constitution but are properly left to legislative judgment. The view of this Court today was early expressed by Mr. Justice Holmes in a famous dissent:

"[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." *Lochner v. N.Y.*, 198 U.S. 45, 75 (1905).

Petitioner recognizes that an "expanded recognition of the *parens patriae* principle" may have convinced many forward-looking and intelligent people that the state should provide to all citizens medical treatment for both physical and mental ills. Equally intelligent people hold opposite opinions. But the Federal Constitution does not require free hospitalization for mental or other illnesses any more than it "enacts[s] Herbert Spencer's Social Statics."[5] The Federal Constitution leaves enough room for this to be a debatable question. And,

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5. *Lochner v. New York*, 198 U.S. 45, 75 (1905) Mr. Justice Holmes dissenting.

> "if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner, Coppage* and *Adkins* cases." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952).

Clearly, the court below no longer believes this liability to be a debatable issue under the Federal Constitution.

B. The Statutory Imposition of Liability for Support on Close Relatives Able to Pay for State Hospital Care Is One Based on a Reasonable Classification.

1. The Reciprocal Duty of Support Between Close Family Members Was Well Established at Common Law and Was Derived from Universal Standards of Morality.

Statutes requiring immediate family members to share, if financially able, in the cost of treating patients in state mental hospitals is based upon a classification heretofore deemed reasonable throughout Anglo-American jurisprudence. The legislatures of some forty-two states have enacted support laws similar in language but identical in principle to that of California (R. 91-92). Is such classification so devoid of reasonable basis as to be "purely arbitrary"[6] or "beyond rational doubt erroneous"?[7]

The concept that the immediate family members have a moral and legal duty to support their indigent or insane relatives was an early part of the development of the common law.[8] In 1601 Parliament enacted the Statute of Eliza-

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6. *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

7. *Dribin v. Superior Court*, 37 Cal. 2d 345, 351; 231 P.2d 809, 813 (1951).

8. In footnote 4 of the California Court's opinion it is mistakenly asserted to the contrary. The cases cited neither analyze nor trace the history of the proposition (R. 53-54).

beth[9] which imposed upon relatives of close consanguinity an obligation to support both indigent and "impotent" or insane family members.

The King's Bench explained the need for this statute in *Rex v. Munden*, 1 Str. 190, 93 Eng. Rep. 465 (K.B. 1719).

> "By the law of nature a man was bound to take care of his own father and mother; but there being no temporal obligation [under the early common law] to enforce that law of nature, it was found necessary to establish it by Act of Parliament . . . ."

In the United States, those decisions which undertook to trace the development of the liability here concerned, found that the doctrine has been firmly implanted in Anglo-American Jurisprudence for 360 years, since the Statute of Elizabeth of 1601. This early Act of Parliament and the subsequent interpretative decisions make the obligation part of our common law.[10]

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9. 43 Elizabeth, ch. 2, § 7 states:
"And be it further enacted, that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter-sessions shall be affected; (2) upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein."

10. The common law "includes not only the *lex non scripta*, but also the written statutes enacted by Parliament." *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 287; 231 P.2d 832, 835 (1951). More precisely, it includes those Acts passed by Parliament prior to the separation of the American Colonies from England. *Moore v. Purse Seine Net.*, 18 Cal. 2d 835, 839; 118 P.2d 1, 3 (1941).

The above principle has long been followed by this court and the U.S. Circuit Courts, *Doe ex dem. Patterson v. Winn*, 5 Pet. 233, 241 (1831); *Manoukian v. Tomasian*, 237 F.2d 211, 215 (D.C. Cir. 1956), and is the majority rule. See cases cited in 78 U. of Pa. L. Rev. 195 (1929); 11 Am. Jur., *Common Law*, § 12 (1938).

In *People v. Hill,* 163 Ill. 186, 187; 46 N.E. 796, 797-8 (1896) it was observed that the duty of supporting close family members, even when insane, was a principle of natural law and one which had always been enforced by the courts of the civil law countries. The court noted that the Statute of Elizabeth was passed to correct the previous "defect" in the English law and to transform "the imperfect moral duty into a statutory and legal liability." See *Beach v. Government of the District of Columbia,* 320 F.2d 790, 792, (1963), *certiorari denied,* 375 U.S. 943 (1963), relying on the same history and principles to sustain the reasonableness and constitutionality of a similar District of Columbia statute.

This obligation was rigidly enforced by the Roman Law[11] and by civil law countries.[12] The Old Testament makes clear a duty to one's parents.[13] The admonition of the Fifth Commandment to "honor thy father and thy mother"[14] includes the duty of support.[15]

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11. See 12 *The Civil Law* (S.P. Scott Transl.) 62, the Code of Justinian, Book I, Extract of Novel 115, Chapter III. If a son refused to support his insane father, or vice versa, all right of inheritance was lost, even a bequest by will. The inheritance went to the one who provided the support.

12. 1 Blackstone, Commentaries, ch. *16; *447, *453 (Cooley's 4th ed. 1899).

13. *Exodus* 20:12; *Leviticus* 19:3; *Deuteronomy* 5:16; *Proverbs* 1:8-9, 23:22.

14. *Exodus* 20:12.

15. Code of Jewish Law (Kitzur Shulban Aruh) *c. 143 § 1. (On honoring father and mother). "What constitutes 'honor'? One must provide them with food and drink and clothing. One should bring them home and take them out, and provide them with all their needs cheerfully."

Our greatest philosophers, such as Plato,[16] Aristotle[17] and John Locke[18] have honored and emphasized obligations based on family relationships.

These authorities demonstrate that the particular obligation here involved cannot be condemned as an "invidious discrimination[19] merely because it is based on a family relationship.

In summary, the support liability here is not one of recent contrivance. It has a long and venerable history in Western civilization and Anglo-American jurisprudence. Mr. Justice Holmes once stated that a classification does not violate the equal protection clause "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[20] Certainly when an obligation can be shown to be part and parcel of those traditions, it can hardly be said to infringe its principles. "The Fourteenth Amendment did not tear history up by the roots . . ." *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948) and the unanimous approval of this ancient liability[21] throughout Western civilization completely repudiates the suggestion that it is "purely arbitrary."

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16. IV Plato, Laws *717. ("Next comes the honour of living parents to whom, as is meet, we have to pay the first and greatest and oldest of all debts . .) . ."

17. See generally, VIII Aristotle, Nicomachean Ethics *c. 12.

18. Locke, *Concerning Civil Government, Second Essay* *66 discussing the natural obligations between parents and children.

19. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), quoting with approval at note 3, *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

20. *Lochner v. N.Y.*, 198 U.S. 45, 76 (dissent) (1905).

21. Justice Cardozo's admonition seems particularly appropriate. "Not lightly vacated is the verdict of quiescent years." *Coler v. Corn Exchange Bank*, 250 N.Y. 136, 164 N.E. 882, 884 (1928).

2. All Previous Decisions Have Upheld the Constitutionality of the Instant Liability.

The obligation here in question is not one that has been left unexamined by the judiciary. Although this Court has never considered the precise question now at bench, every state and federal court which has previously considered it has found the classification herein to be reasonable in respect to civil commitments.

The most recent decision is *Beach v. District of Columbia*, 320 F.2d 790 (1963), *certiorari denied*, 375 U.S. 943 (1963). The statute there involved, section 21-318 of the District of Columbia Code, is virtually identical to California's Welfare and Institutions Code section 6650. The District obtained a judgment against a father of an adult daughter for a portion of the cost of treating her in Saint Elizabeth's Hospital. On appeal the judgment was affirmed by the Court of Appeals for the District of Columbia. The court delineated the reasons why the imposition of such liability cannot be deemed arbitrary or unreasonable:

> "[W]hen the law turns also to the father for help, if he is able to give it, when the estate of the incompetent is insufficient, it does so only to supplement the public responsibility. Placing a secondary obligation upon the father finds its validity in the reasonableness of attaching legal significance to the natural bonds of consanguinity. It is not unreasonable, it is not a denial of due process, for the law to attach an enforceable obligation to the moral obligation which exists in the usual family relationship of father and daughter." 320 F.2d at 793.

The court's emphatic statement of the reasonableness of "attach[ing] an enforceable obligation to the moral obligation which exists in the usual family relationship" (Ibid.) makes the court's reasoning directly applicable to equal

protection cases[22] because it meets squarely and disposes of the contention that the classification is essentially arbitrary.

Without exception, support statutes involving classifications virtually identical to that here in issue have been sustained as being neither arbitrary nor unreasonable. E.g., *People v. Hill*, 163 Ill. 186, 46 N.E. 796 (1896); *State v. Bateman*, 110 Kan. 546, 204 P. 682 (1922); *In re Idleman's Commitment*, 146 Ore. 13, 27 P.2d 305 (1933); *Kough v. Hoehler*, 413 Ill. 409, 109 N.E. 2d 177 (1956); *State v. Webber*, 163 Ohio 598, 128 N.E. 2d 3 (1955); *Dept. of Public Welfare v. Haas*, 15 Ill. 2d 204, 154 N.E. 2d 265 (1958).

Typical of the attitude of the courts which have upheld these support statutes against constitutional attack is a California decision not mentioned in the opinion below.

> "And, as to the proposition of the alleged unequal burden imposed upon one class, thus, as contended, discriminating in favor of another upon whom the burden is not cast, the answer is, we think, that the so-called unequal burden is only one springing from a natural duty which, as to its performance, the legislature has recognized by positive enactment. (Civ. Code, §§ 38, 206.)" *State Commission in Lunacy v. Eldridge*, 7 Cal. App. 298, 304, 94 Pac. 597, 599 (1908).

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22. *Bolling v. Sharpe*, 347 U.S. 497 (1954), also a case from the District of Columbia, demonstrates the reasoning in *Beach* comes to bear upon the instant question. There, this Court pointed out (at 499) that while equal protection may be a more explicit safeguard than due process, and hence not always interchangeable with it, "the concepts of equal protection and due process, *both stemming from our American ideal of fairness*, are not mutually exclusive." (Emphasis added), *Detroit Bank v. United States*, 317 U.S. 329, 337-338 (1943); *Currin v. Wallace*, 306 U.S. 1, 13-14 (1938). The Court in *Bolling* then proceeded to strike down racial discrimination in the District of Columbia under the same basic rationale as it used the same day in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) under the Equal Protection Clause.

Only six years ago the court below upheld this same liability against charges of denial of equal protection in an exhaustive and comprehensive opinion. *Dept. of Mental Hygiene v. McGilvery*, 50 Cal. 2d 742, 754; 329 P.2d 689, 694 (1958).

3. Equal Protection Is Not Denied to the Wealthy Relatives Because of Their Ability to Pay.

The court below implies that an additional denial of equal protection exists because collection of medical costs from relatives is contingent on ability to pay. (See §§ 6651-6653.) The court said,

> "It is established in this state that the mere presence of wealth or lack thereof in an individual citizen cannot be the basis for valid class discrimination." (R. 57)

The authority cited by the court is *Dribin v. Superior Court*, 37 Cal. 2d 345, 348-350; 231 P.2d 809 (1951), where the need to prove financial responsibility resulted in a type of divorce available to the rich but denied to the poor.

Under such circumstances the claim of "unreasonable class discrimination" is appropriate and similar contentions have been frequently upheld by this Court. *Douglas v. California*, 372 U.S. 353 (1963) (right to free counsel on criminal appeal); *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *and, Griffin v. Illinois*, 351 U.S. 12 (1955) (right to free transcript on criminal appeal). In all of these cases the discrimination, deemed invidious, was against the indigent. Equal protection would be the issue here if those who pay received better treatment in proportion to what they pay and the poor were neglected. Payment has no bearing on the character of treatment and care. All get the treatment they require in equal amount whether they pay or not (R. 89). The ability-

to-pay standard results in liability for some, but not for others. This ability-to-pay concept is a familiar one. See any U.S. Internal Revenue Act since adoption of the graduated income tax!

Would this Court be prepared to say that having confirmed the constitutional right of the poor to counsel or transcript on appeal, it has created another invidious discrimination which allows the rich to complain that they are being unconstitutionally denied a free transcript or counsel because of "the mere presence of wealth"? (R. 57). We submit that no such absurd consequence was contemplated. On the contrary, in *Griffin, supra*, at p. 19, and *Douglas, supra*, at p. 355, this Court declared the evil to be discrimination against the indigent because the wealthy had the means to protect their rights by paying for counsel and transcripts.

The policy of the states, as expressed in statutes which require the patient and close relatives, if able, to reimburse the state for costs of maintaining mental institutions, has been judicially recognized. Heretofore, without exception, ability-to-pay has been held to be based on a reasonable distinction. *Acting Com'r of Mental Health v. Williamson*, 330 Mass. 52, 54; 110 N.E. 2d 916, 917-918 (1953); *Kough v. Hoehler*, 413 Ill. 409, 419; 109 N.E. 2d 177, 181-182 (1952); *De Jarnette v. Hospital Authority of Albany*, 195 Ga. 189; 23 S.E. 2d 716, 722 (1942); *Estate of Yturburru*, 134 Cal. 567, 66 P. 729 (1901); *State Commission in Lunacy v. Eldridge*, 7 Cal. App. 298; 94 P. 597 (1908); *Dept. of Mental Hygiene v. McGilvery*, 50 Cal. 2d 742; 329 P.2d 689 (1958).

4. The Cases Cited in the Opinion Below Do Not Support the Decision That Family Relationship Is Not a Valid Basis for Classification.

In attacking the classification based on family relationship, the court below directly relied upon *Estate of Tetsu-*

bumi Yano, 188 Cal. 645, 206 Pac. 995 (1922) and *Hoeper v. Tax Commissioner*, 284 U.S. 206 (1931). In support of this premise the court also cited *Oyama v. California*, 332 U.S. 633 (1948) (R. 57). These cases are not authority for the conclusion that a classification based on family relationship is inherently discriminatory.

In *Estate of Yano*, a Japanese alien ineligible to own land under the California Alien Land Act sought guardianship over his American born minor child's property. The California Supreme Court held unconstitutional the statute which prohibited appointment of an alien, who could not himself own property, as guardian of his child's property. The court stated, "It [the statute] is clearly a discrimination against citizens of Japan residing in this State." 188 Cal. 645, 654, 206 P. 995, 999. The classification by nationality, not by family relationship, was declared unconstitutional. Similarly in *Oyama* this Court held unconstitutional on the ground of racial discrimination, not family relationship, that part of the California Alien Land Law which effected escheat to the state of lands held by a minor American citizen whose lands had been paid for by his parent, a Japanese citizen ineligible for naturalization.

In *Hoeper v. Tax Commission*, 284 U.S. 206 (1931), this Court invalidated a statute under which a state assessed an income tax against the husband measured by the sum of the income of both husband and wife. The California Court here referred to *Hoeper* as if controlling on the question of whether a family relationship is a permissible basis for classification[23] and then quoted from the case the truism

23. This Court has always upheld, against charges of denial of equal protection, *preferential* inheritance tax treatment for close family members as against strangers or collateral heirs. *Campbell v. Calif.*, 200 U.S. 87, 94 (1905).

that a state is forbidden to deny equal protection of the law (R. 57). Mr. Justice Holmes' dissent[24] to *Hoeper*, concurred in by Justices Brandeis and Stone, is more compatible with current authorities.[25] Whatever that case means today, it cannot justify striking down this classification merely because it is based on family relationship.

The court below found "dispositive of the issue before us" (R. 55) its holding in *Dept. of Mental Hygiene v. Hawley*, 59 Cal.2d 247, 379 P.2d 22 (1963), in which the court had invalidated relative responsibility for the support and treatment of the criminally insane. The holding of *Hawley* is:

> "The Fourteenth Amendment, 'in declaring that a State shall not "deprive any person of life, liberty or property without due process of law," gives to each of

24. "So far as the Constitution of the United States is concerned, the legislature has power to determine what the consequences of marriage shall be, and as it may provide that the husband shall or shall not have certain rights in his wife's property, and shall or shall not be liable for his wife's debts, it may enact that he shall be liable for taxes on an income that in every probability will make his life easier and help to pay his bills. . . . It is said that Wisconsin has taken away the former characteristics of the marriage state. But it has said in so many words that it keeps this one. And when the legislature clearly indicates that it means to accomplish a certain result within its power to accomplish, it is our business to supply any formula that the *eleganta juris* may seem to require." 284 U.S. at 220.

25. For example, see *Fernandez v. Wiener*, 326 U.S. 340 (1945) upholding a federal estate tax measured by the value of the entire community property at the time of the death of the husband. See especially Justice Douglas' concurring opinion questioning *Hoeper* (at 365). *Albanese D'Imperio v. Secretary of Treasury*, 223 F.2d 413, 415 (1st Cir. 1955), questions whether, in the light of later cases, "[*Hoeper*] still speaks with authority." In addition, see *Ballester v. Descartes*, 181 F.2d 823, 829 (1st Cir. 1950), questioning if "*Hoeper v. Tax Commission* would be followed today even on its particular facts" in view of *Fernandez*. *Cf. Ballester-Ripoll v. Court of Tax Appeals*, 142 F.2d 11, 17 (1st Cir. 1944) *certiorari denied*, 323 U.S. 723 (1944), for a similar implication.

> these an equal sanction; it recognizes "liberty" and "property" as co-existent human rights, and debars the States from any unwarranted interference with either.' (*Coppage v. Kansas* (1915) 236 U.S. 1, 17 • • •. It has further been declared that 'Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three.' (*Smith v. Texas* (1914) 233 U.S. 630.)" 59 Cal.2d at p. 256; 379 P.2d at p. 28.

A decision which finds "dispositive" a case whose sole constitutional authority is the repudiated doctrine of *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating a statute outlawing "yellow dog" contracts) and *Smith v. Texas*,[26] 233 U.S. 630 (1914), is clearly infected with the infirmity of those cases. Any reliance today on *Coppage* is as misplaced as would be reliance upon the majority opinions in *Lochner v. New York*, 198 U.S. 45 (1905), or *Adkins v. Childrens Hospital*, 261 U.S. 525 (1923). Over twenty years ago this Court refused to follow *Coppage*, stating:

> "The course of decisions [since *Adair* and *Coppage*] have completely sapped those cases of their authority." *Phelps Dodge v. Labor Bd.*, 313 U.S. 177, 187 (1941).

And only last term this Court said,

> "The doctrine that prevailed in *Lochner*, *Coppage* and *Burns* and like cases—that due process [or equal protection] authorizes courts to hold laws unconstitu-

26. (Mr. Justice Holmes dissenting). Statutory qualifications for freight conductor were held to be unconstitutional, apparently because the court did not believe them necessary. This decision is severely undermined by recent decisions giving wide latitude to legislatures to regulate occupations, for example, *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (debt adjusting by non-lawyers forbidden), *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (forbidding opticians from duplicating lenses without a prescription).

tional when they believe the legislature has acted unwisely—has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).[27]

To recapitulate briefly, petitioner has demonstrated two facts: First, that a liability so familiar throughout western civilization, so frequently examined by state courts of last resort, enacted by an overwhelming majority of the legislatures of the several states, cannot be said to be "purely arbitrary"; nor can it be said to "infringe fundamental principles as they have been understood by the traditions of our people and our law."[28] Second, it is obvious neither *Hoeper*, *Hawley* (resting solely on *Coppage*, *Smith v. Texas*) nor any case dealing with race discrimination cited by the court below supports the holding that this classification based on filial and parental bonds is "without any reasonable basis."

How then can this decision be explained? As previously pointed out, supra pp. 7-8, the court below has taken on itself the task of deciding the wisdom of the legislation.

C. There Is a Reasonable Relationship Between the Legislative Purpose and the Classification.

Equal protection of the laws is not violated if there is a reasonable relationship between the legislative purpose and the class designated. The burden imposed on the class may be greater than that imposed on the public as a whole. *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 493-494 (1926).

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27. Equally positive condemnations of *Coppage* were made in *Day-Brite v. Missouri*, 342 U.S. 421, 423, 425 (1949) and *Lincoln Union v. Northwestern*, 335 U.S. 525, 535-536 (1949). See also *Williamson v. Lee Optical*, 348 U.S. 483, 488-489 (1955), *Daniel v. Family Ins. Co.*, 336 U.S. 220, 224 (1949).

28. *Lochner v. N.Y.*, 198 U.S. 45, 76 (Mr. Justice Holmes dissenting).

The purpose here is partially to relieve the state of the burden of caring for the mentally ill. The class upon whom the burden is imposed is identical with the class which has the common law or moral duty of support. It is the class which derives a greater benefit than the public as a whole. Thus the statutory classification is drawn along lines which are logically related to the purpose of the law. *Morey v. Doud*, 354 U.S. 457, 466 (1957).

The rational basis supporting such classifications has been clearly enunciated by every other state court which has had the specific question before it. Simply stated, it is that the relatives obtain more direct benefits than society as a whole. As one court observed,

> "Those patients in the State hospital for the purpose of treatment alone [civil commitments] are of direct and vital interest only to their relatives and friends. It is true that the public has an indirect moral interest in their care and well being, but they are of direct consideration only to their close friends and relatives." *Kough v. Hoehler*, 413 Ill. 409, 417; 109 N.E. 2d 177, 181 (1956).

Language to the same effect was used by the courts in *Guthrie Co. v. Conrad*, 133 Iowa 171; 110 N.W. 454 (1907); *State v. Bateman*, 110 Kan. 546; 204 Pac. 682 (1922); *In re Idleman's Commitment*, 146 Ore. 13, 27 P.2d 305 (1933); *Atkins v. Curtis*, 259 Ala. 311, 66 So. 2d 455, 458 (1953); *People v. Hill*, 163 Ill. 186, 46 N.E. 796 (1891); *State Commission in Lunacy v. Eldridge*, 7 Cal. App. 298, 94 P. 597 (1908).

These cases also refute the California Court's contention that this is a "species of taxation" (R. 58).

This Court in examining statutes attacked on the ground of denial of equal protection has stated:

"A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552; *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U.S. 96." *McGowan v. Md.*, 366 U.S. 420, 426 (1960).

Certainly there are other states of facts which may reasonably be conceived to justify relative liability for support for a mentally ill person in a state tax supported hospital.

The Legislature here might well have considered that relative responsibility would tend to avoid or minimize certain deleterious effects upon patients and society, and that the financial involvement might encourage other effects deemed therapeutic.[29]

Maintaining the family's close interest in a patient is an important ingredient of a speedy recovery.[30] The Legislature might well have believed that families who made a contribution within their means toward a patient's cost of treatment would be more likely to continue an interest in the

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29. This is the conclusion of the Council of State Governments, "Mental Health Programs of the Forty-Eight States" (1950), p. 8, "Much of the stigma surrounding hospitalization of the mentally ill might be averted if patients could feel that they were making a contribution toward the cost of their hospitalization, as in a general hospital for physical illness. Patients *or their legally responsible relatives* should contribute to the cost of hospital care and treatment in accordance with the financial ability. . . ." (Emphasis added.)

30. Lidz, et al., *Patient-Family-Hospital Interreiationships* in *The Patient and the Mental Hospital* 535 (Greenblatt et al. eds. 1957; Preston, *The New Public Psychiatry*, 31 Mental Hygiene 177 (1947).

patient than a family freed of any responsibility for their family member.[31]

Most commitments to state hospitals are effected by close family members. But children with an aged parent generally have several choices as to how the parent can be best cared for. Entrance into a private home for the aged, or a nursing home, usually carries financial implications for the children able to pay. Consequently for economic reasons if the decision below stands, admissions to state hospitals will be sought by relatives for patients now being cared for adequately at home or in community located privately operated facilities. In addition,

> "Admission to a state hospital might become preferable to local treatment programs. The economic advantage to the family might outweigh the accepted principles of sound psychiatric practice. For example, 24-hour hospitalization in a large facility miles from home might be preferred to day treatment in a community psychiatric facility close to the family and more in keeping with the patient's social and psychological needs, purely for economic reasons." (R. 100) . . . "(W)e anticipate

31. "The justification of the private support obligation reaches beyond the question of financial necessity. Enlightened application of the principle of private responsibility may constitute a potentially effective instrument in achieving the difficult goal of reshaping community attitudes toward the mentally ill. . . . Indeed, underlying the beliefs of those who advocate the abolition of private responsibility may well be a general charitable intent to attenuate the family's identification with its mentally ill member by interposing the impersonal agency of a benevolent government. When group responsibility is substituted for individual responsibility in this way, the likelihood of critical re-examination of individual attitudes considerably diminishes.

"Conversely, the operation of private responsibility programs necessarily requires that some individuals face squarely the problem of mental illness as it affects them. . . . This approach tends to undercut popular stigmatization of mental illness by viewing the care of mental patients as not very different from the treatment of, say, persons suffering from appendicitis." *Mernitz, Private Responsibility for the Costs of Care in Public Mental Institutions,* 36 Ind. L.J. 443 (1961).

a trend in the direction of increased admissions, increased readmissions and decreased releases because the economic advantages will outweigh the social and psychological responsibility." (R. 101)[32]

The tendency toward using state hospitals for a "dumping ground" for disturbed persons of the lower economic classes (for whom treatment and custody has always been free) has been noted by Hollingshead and Redlich who studied the relationship between socio-economic classes and mental illness.[33]

Previously, the financial implications of committing a parent had some deterrent effect on a middle or upper class family's decision to commit a senile parent. The value of alternatives was considered. The court's decision, making the state hospitals free insofar as relatives are concerned may well prove to be an important barrier to the development of community resources for the outpatient treatment of patients with psychiatric disorders.

Consequently state mental institutions may again be so overcrowded that the present trend from custody to treatment necessarily will be reversed.[34]

The opinion below also voices a disturbing retrogression in its view of the legal basis for the commitment of the mentally ill. In support of its holding that there is no rational

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32. Dr. E. F. Galioni, Dep. Dir., Hospital Clinical Services, Calif. Dept of Mental Hygiene.

33. Hollingshead and Redlich, *Social Class in Mental Illness*, pp. 330-31 (1958). The conclusions of this study are set out in Mernitz, *ibid.* 36 Ind. L.J. 443-473, n.101. They said, in part, "Ordinarily, these persons are not wanted by their families, and they are viewed as useless, obnoxious, and occasionally dangerous to society, if not to themselves. The sequel to rejection by the family and isolation from the community is long-range custodial care."

34. See Lindman and McIntyre: "The Mentally Disabled and the Law" p. 19 (1961).

basis for the imposition of the liability for support on close family members the court assumes that the confinement of a patient in a state mental hospital is "for their protection and the protection of others." (R. 57) No statute or legislative history is given to support this assumption.[35] The vice of the court's opinion is its equating the hospitalization of the mentally ill under civil commitment with confinement of those charged with or convicted of a crime. It is this notion which is the foundation for the court's conclusion that the maintenance of state mental hospitals is purely a public duty, one which cannot be shifted even in part, to the family of the patient.

The court apparently concludes that all the mentally ill must be confined much as criminals are confined, that both are a danger to society. This is made explicit by its finding that a case invalidating relative responsibility for the criminally insane[36]

> "is dispositive of the issue before us. Whether the commitment is incidental to an alleged violation of a penal statute, as in *Hawley*, or in essentially a civil commitment as in the instant case, the purposes of confinement and treatment or care in either case [are the same]."[37] (R. 55)

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35. The court's statement to this effect, attributed to *Dribin v. Superior Court*, 37 Cal. 2d 345, 352, 231 P.2d 809 (1951), is actually a quotation therein from 14 Cal. Jur. 341-342, § 6. This secondary authority was published in 1924. Concepts about mental illness have changed dramatically since then.

36. *Dept. of Mental Hygiene v. Hawley*, 59 Cal. 2d 247, 379 P.2d 22 (1963).

37. Reliance on *Hawley* is indeed surprising. Only last year the very distinction now casually swept aside was thought to make a constitutional difference when the Court said,

> ". . . here . . . the committed person is held in the state institution not merely because he is (or was) *insane* but because the state, in a proceeding instituted by it, has accused him of *crime* and *his detention is found to be necessary for the protection of the public.*" *Dept. of Mental Hygiene v. Hawley*, 59 Cal. 2d 247, 255 (1963) (Emphasis by the court.)

As one law review commentator observes, this analogy constitutes

> "a view of psychiatric medicine which now seems anachronistic. No longer are the mentally ill locked up in houses of bedlam primarily to protect the rest of society from irksome interferences. . . . [38]

Psychiatrists today deplore custody-oriented law such as expressed in the opinion below. A group of psychiatrists, who studied the commitment procedures across the country noted as their opening observation on outmoded commitment laws, that

> "Historically the commitment in early statutes was limited to the dangerously insane. This has tended to perpetuate the stigma of criminality upon mental illness."[39]

Dr. Walter Rapaport, a noted psychiatrist and former Director of the California Department of Mental Hygiene, has explained (R. 86-91) the historical origin of this custodial or protection-of-society view of the function of mental institutions:

> "Some considered the manifestations of the so-called insane person to be related to sinfulness, some to crim-

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38. Comment, 39 N.Y.U. L. Rev. 858 (1964); see Appendix B.

39. Group for the Advancement of Psychiatry, Commitment Procedures (Report No. 4, April 1948).

For a scholarly and exhaustive treatment of mental hygiene laws across the country and suggested reforms, see Comment: Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill, 56 Yale L.J. 1178 (1948). At pp. 1185-86, the author traces the history of "the Community Interest in Self-protection" or "dangerous to be at large" basis for commitment. "The present existence of this criterion in some commitment statutes manifests continued association of mental hospitals with dangerous insanity and tends to perpetuate the stigma of criminality attached to mental illness." The author urges ". . . legislative reform which will disassociate the process of admitting patients to mental hospitals from that of committing criminals to public jails." (at p. 1200.)

> inality, and in some instances the insane person was pictured to be related to God or some other power for good or for evil. Thus it is easy to understand why there was a public demand that this type of person be isolated from society on the basis of the majority feeling that they were a danger and a menace." (Ibid.)

However, psychiatrists today view the concept that the mentally ill are by and large dangerous as little more than a layman's superstitution. Dr. Rapaport states further,

> "With the trend away from custody toward treatment, there has also developed the realization that by and large the mentally ill cannot be considered as dangerous to society. It has been established by scientific studies that people who have been in our hospitals . . ., commit less crimes of violence when compared to the general population than do those who have not been in our hospitals . . ." (R. 89)

Dr. Rapaport further indicates (Ibid.) that barred windows and locked doors are, but for a handful of patients and those at Atascadero (institution for the criminally insane), a thing of a past and unenlightened age.[40] He concludes with the observation that mental hospitals today must be considered not as custodial institutions but rather as centers for "treatment, training, education and research activities." (R. 90)

Mental patients are now being treated as human beings with a curable disease, not as persons posing a threat to society.

In one respect the court's premise here is identical to a claim made in *Kough v. Hochler*, 413 Ill. 409, 109 N.E.

40. As part of the record (R. 93) is a photograph of a hospital built when it was thought that state hospitals were primarily for the protection of society and the patient. It was an "insane asylum", not a hospital.

2d 177 (1952). It was there argued that there is no constitutional difference between liability of the family for the criminally insane and those committed pursuant to civil proceedings. In that case the court disposed of the contention by stating:

> "We cannot agree with plaintiff's reasoning that there is no valid basis for making a distinction between persons who are in the hospital merely for treatment and those who are imprisoned on account of some criminal charge or offense and who, if they were in physical and mental health, would be in the jails or penitentiaries. We think there is a clear basis for distinction. Inmates against whom there are no criminal charges, or who have been guilty of no criminal offenses, are in the hospital solely for treatment. Those who are charged with crime, or who have been convicted of crime, would ordinarily be in the jail or penitentiary, but on account of the fact that there are no facilities there for treating them for their physical and mental ills they are transferred to the hospitals. Moreover, the public is vitally and directly interested in those who are in custody. They are in custody initially for the protection of the public, when convicted or accused of a crime. They do not cease to be of intimate consideration to the public merely because they are, or become, insane, nor do they cease to be in custody for the same reason." 413 Ill. 409, 416; 109 N.E. 2d 177, 181.

The California court is of course correct in stating that some benefit accrues to the public from the incarceration of that handful of actually dangerous persons[41] and from

41. See *State Comm. v. Eldridge*, 7 Cal. App. 298, 94 P. 597 (1908) in which the court acknowledges the public benefit from the detention of dangerous persons, but correctly states that the "principal purpose" is to treat the sick.

the "reclamation [of the person] as a productive member of society." (R. 55) But as another court pointed out in *Beach v. Government of District Columbia*, 320 F.2d 790, 793 (1963), recognition of a public responsibility is not incompatible with individual liability of certain family members.

The law is full of analogous situations. Streets can be paved over the protest of an abutting property owner. The public benefit and purpose may be clear, yet a charge can be assessed against those benefiting individually. Every fire regulation benefits the public, but the cost of compliance can be thrust on the property owner even if the cost is undoubtedly an economic hardship. See *Queenside Hills v. Saxl*, 328 U.S. 80, 83 (1945) where due process and equal protection objections against enforcement of an onerous fire regulation were rejected.

Therefore, the fact that state mental hospitals undoubtedly benefit the public cannot make the liability herein unconstitutional.

Moreover, the court's assumption that by and large patients are "committed" by court order against their will is outmoded, although this may remain the popular belief. Voluntary admissions[42] and certification by the county health officer are attempted first and formal commitment is, in enlightened communities, merely a last resort.

In summary, analogies of the forceable detention of criminals, with invocation of the old-fashioned fears of the

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42. Comment, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 47 Yale L.J. 1178 at 1201-1202 (1947). See generally Overholser, *The Voluntary Admission Law: Certain Legal and Psychiatric Aspects*, 80 Am. J. Psychiatry 475 (1924). For discussion of the *actual* practice in California and the trend toward eliminating "commitment", see Nix, *Recent Procedural Revisions in the Psychiatric Department, Superior Court of Los Angeles County*, 34 L.A. Bar. Bull. 291 at 292-93, 309 (1959).

"dangerous lunatic" who must be incarcerated against his will for the good of the public, assist not at all in judging the constitutionality of relative's responsibility for the mentally ill in light of the modern use of mental hospitals and the adjustment legal machinery has made and must still make to assist in the "reclamation [of the patient] as a productive member of society." (R. 55)

D. Under the Liability for Support Imposed by the California Statute, There Cannot Be Arbitrary Exaction from the Patient's Estate or from Relatives.

1. There Is Statutory Protection for the Patient's Estate from Such Exaction.

California Welfare and Institutions Code section 6650 imposes upon the patient's estate an unconditional liability for his support; payment, however, is subject to the probate court's determination, under section 6655 of the same code, that the patient will not be released from the hospital or if released will not become a public charge.

A certificate from the medical superintendent of the state hospital is prima facie evidence that the patient's recovery is beyond reasonable hope. If the probate court is satisfied that the patient will not be released it orders the guardian to pay the amount due. *Dept. of Mental Hygiene v. Mannina*, 168 Cal. App. 2d 215, 219; 335 P.2d 694, 697 (1959); *Estate of Setzer*, 192 Cal. App. 2d 634, 641-642; 13 Cal. Rptr. 683, 687 (1961).[43]

Section 6655 directs the guardian of the patient's estate to pay the cost of care of the ward. Such payment is ordered if the ward "has sufficient estate for the purpose" . . . "to the extent of the estate." The guardian may be directed by

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43. California is but one of a number of states which require the preservation of a cushion of assets against the patient's eventual release to avoid his becoming a charge against the state. Mernitz: "Private Responsibility for the Costs of Care in Public Mental Institutions" 36 Ind. L.J. 443, 456 (1960-61).

the probate court to sell so much of the estate's personal or real property or both as is necessary to pay these costs.[44]

These code sections indicate that the Legislature has shown a dual concern: (1) preventing impoverishment of a patient who may be released from a mental hospital and (2) recovering costs of care from the patient's estate. To implement this duality of purpose the California courts have approved "equitable liens" on the patient's estate in favor of the Department of Mental Hygiene as security for accrued and future costs of care, thereby reasonably securing the state's claim, but avoiding the immediate liquidation of the patient's assets. Thus both the incompetent and the state are protected. *Estate of Hicks*, 228 A.C.A. 704; 39 Cal. Rptr. 698 (1964); *Estate of Mims*, 202 Cal. App. 2d 332; 20 Cal. Rptr. 667 (1962); *Estate of Setzer*, 192 Cal. App. 2d 634; 13 Cal. Rptr. 683 (1961).

If the patient is discharged, and the property must be sold for her support, the equitable lien may be subordinated by the court to this purpose. *Estate of Hicks*, 228 A.C.A. at p. 708; 39 Cal. Rptr. at p. 700.

In the instant case an equitable lien had been ordered by the probate court on the patient's own real property for the sum of $6,425.00 covering accrued costs of care for the period ending September 30, 1958 and for future charges (R. 9).

The respondent as administratrix of the estate of the patient's deceased daughter rejected the department's creditors' claim of $7,554.22. This claim was to obtain reimbursement for the patient's care for the period August 25, 1956 to August 24, 1960, the four-year period preceding the daughter's death. Instead, the respondent in her role

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44. Further protection is afforded the patient and responsible relatives by Code of Civil Procedure section 345 which limits recovery for past charges to a four-year period.

as guardian of the incompetent's estate offered to pay the amount of the claim from the assets of the patient.[45] Since such payment could only be made with the probate court's approval, *McCracken v. Lott*, 3 Cal. 2d 164, 44 P.2d 355 (1935); *Guardianship of Cuen*, 142 Cal. App. 2d 258, 298 P.2d 545 (1956), she requested an itemized statement of all accrued charges to submit to the court (R. 9-10). However, payment of these charges would have exhausted the patient's estate. The probate court therefore would not have approved such payment in full absent satisfactory proof that there was no hope of the patient's release from the hospital. Respondent did not contend the patient was chronically insane. Rather, she insisted that exhaustion of her ward's estate was required as a matter of law before the daughter's estate could be held liable.[46]

By stating that the incompetent mother "owns . . . some $11,000 in cash" (R. 53), the court below implied that this sum is available for her support. This is not correct; indeed, it is misleading. The patient's real property was sold for approximately that sum and the proceeds are held in escrow

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45. In this case the respondent is guardian of the incompetent (the patient) and also administratrix of the decedent's estate. To the extent Mrs. Kirchner can pay the obligations of the decedent's estate out of her ward's assets, she will inherit an equal amount from the estate of which she is both primary beneficiary and administratrix. (R. 15-16).

46. The complete impoverishment of a patient as a prerequisite to proceeding against a relative would result in depriving the patient of even a modest allowance for his basic needs. Analogous situations indicate that no constitutional considerations dictate such harsh treatment. In *Commonwealth v. Kotzker*, 179 Pa. Super. 521, 525; 118 Atl. 2d 271, 273 (1955), the court declared that "[Indigent] encompasses also those persons who have some limited means . . . but whose means are not sufficient to adequately provide for their maintenance and support." Cf. 42 U.S.C. 302 (a)(10)(A) providing that although a state disregards a portion of an applicant's income it may still qualify for matching Federal funds for old-age assistance programs. See *San Bernardino County v. Simmons*, 46 Cal. 2d 394; 296 P.2d 329 (1956).

(R. 9). The actual net amount payable to the guardianship estate is not alleged. Assuming the entire sum held in escrow is payable to the guardianship estate, the incompetent does not "own" some $11,000 in cash. This sum is subject to payment to the department of the charges which accrued prior to the period covered in the claim against the daughter's estate (August 24, 1956). It is further subject to costs of care for an undetermined period after the daughter's death. In addition it is subject to guardian and attorneys' fees and other costs of administration.

Acceptance of the respondent/guardian's offer to pay from the patient's estate the $7,554.22 and all accrued charges would necessarily include the amount due for the period prior to August 24, 1956. This would have completely exhausted the estate. There would be nothing left for the patient's future personal needs, burial expenses or costs of care after August 24, 1960. The law does not demand such a harsh result.

2. There is Also Statutory Protection for the Responsible Relatives.

Section 6650 imposes upon certain relatives a liability for support, subject however to the ability-to-pay provisions of sections 6651 and 6653 with judicial review under Code of Civil Procedure section 1094.5. Since the obligation is joint and several there is a right to contribution under Civil Code section 1432. The adult child obligation may be entirely eliminated in the event of parental abandonment.[47]

47. Release by judicial decree from all statutory obligations to support a parent may be obtained under Civil Code § 206.5 by an adult child whose parent abandoned him for at least two years prior to the child's reaching the age of 18 years. The child must produce proof of abandonment and that during this period the parent was physically and mentally able to support him. *County of Alameda v. Clifford*, 187 Cal. App. 2d 714; 10 Cal. Rptr. 144 (1960); *Johns v. Kleinkoff*, 189 Cal. App. 2d 711; 11 Cal. Rptr. 412 (1961).

The court below expressed concern over the power of an administrative agent to select a person from the classes of relatives designated by the Legislature to uphold the imposition of support liability and in the process "denude" the relatives of their assets (R. 58). That this is impossible is apparent from examining other statutory provisions that complement section 6650.

In *Dept. of Mental Hygiene v. McGilvery*, 50 Cal. 2d 742, 751; 329 P.2d 689, 698 (1958), the California Court held that section 6650 imposes a liability on the named close relatives and their estates and the estate of the incompetent for the cost of care at a state hospital. The court recognized that this liability was subject to the safeguards afforded by sections 6651 and 6653.

Section 6651 provides, in part, that,

> "The Director of Mental Hygiene may reduce, cancel or remit the amount to be paid by the estate or the relatives, as the case may be, liable for the care, support, and maintenance of any mentally ill person . . . who is a patient of a State Hospital for the mentally ill, on satisfactory proof that the estate or relatives, as the case may be, are unable to pay the cost of such care, support and maintenance. . . ."

The record does not show that respondent sought this administrative relief. In *McGilvery, supra*, 50 Cal. 2d at 761, 329 P.2d at 699, the court stated,

> "It must be presumed in the present case that if an application had been made for a determination of the decedent's inability to pay and satisfactory proof presented, the director might have reduced, cancelled or remitted the amount to be paid in accordance with section 6651."

No reason is given for a contrary presumption now.

Section 6653 requires the department to make an investigation to determine whether the patient has any relative or relatives responsible under the provisions of section 6650 for the payment of the cost of maintenance. This section compels the department to "ascertain the financial condition of such relative or relatives to determine whether in each case such relative or relatives are in fact financially able to pay such charges." The department is further directed to make findings in connection with its investigation.

Judicial review after a final decision by any administrative agency can be had by use of the Writ of Mandate (Code of Civ. Proc. § 1094.5).[48] See *Temescal Water Co. v. Dept. of Public Works*, 44 Cal. 2d 90, 100, 101; 280 P.2d 1, 7 (1955); *Dept. of Mental Hygiene v. McGilvery*, 50 Cal. 2d at pp. 760-761, 329 P.2d at p. 699. The court's function in such case is to rectify an arbitrary or discriminatory administrative decision.

In addition to the foregoing, the safeguard of joint debtor contribution is available. California Welfare & Institutions Code section 6650 expressly provides that the obligation is joint and several. Consequently, under California Civil Code section 1432 the joint and several obligor, "who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him." The court below was in error in stating that relatives who contribute to the patient's care in accordance with section 6650 have no right to recoup from the assets of the patient (R. 58).

The right to contribution given under Civil Code section 1432 is controlled by principles of equity. *Jackson v. Lacy*, 37 Cal. App. 2d 551, 559; 100 P.2d 313, 317 (1940). It can-

48. Kleps, Certiorarified Mandamus: Court Review of California Administrative Decisions 1939-1949, 2 Stan. L. Rev. 285 (1950).

not be invoked arbitrarily. For example, equity would not permit recoupment from the estate of the patient if to do so would leave him a burden upon society (Section 6655; see *McCracken v. Lott*, 3 Cal. 2d 164, 44 P.2d 355 (1935)) nor would equity permit recoupment with mathematical nicety from other joint and several obligors in disregard of their financial ability. *Cf. Jackson v. Lacy*, 37 Cal. App. 2d at p. 560; 100 P.2d at p. 318. However, within the limits indicated there is unquestionably a right of contribution from other joint and several obligors including the patient's estate.

This rule of law has been applied to similar situations, e.g., where one child paid for the support of an indigent parent and the other children were required to contribute on the express or implied joint and several obligation. *Manthey v. Schueler*, 126 Minn. 87; 147 N.W. 824 (1914); *Wood v. Wheat*, 226 Ky. 762, 764, 11 S.W. 2d 916, 918 (1928); *Mallatt v. Luihn*, 206 Ore. 678, 695-696, 294 P.2d 871, 882 (1956). See also *Muse v. Muse*, 215 La 238, 242, 40 So. 2d 21, 23 (1949).

In brief, the statutory protections afforded the family members from arbitrary action of an administrative agent to impose the support liability patently make it impossible to arbitrarily "denude" the relatives of their assets.

II.

THE DECISION BELOW DENIED PETITIONER PROCEDURAL DUE PROCESS

In urging a denial of procedural due process, petitioner is in a peculiar position by virtue of being itself an arm of the State. Nevertheless, it is urged that when petitioner is before any state court, it should be accorded the fairness due any litigant.

In this case, the Supreme Court of California had before it numerous briefs, a decision below, and oral argument, all limited to whether equal protection required a priority in liabilities and whether exhaustion of the patient's estate preceded the liability of responsible relatives. At no time did respondent question the constitutionality of this latter liability. Despite the clear opportunity to command argument on this basic and completely different question, the court remained silent, only to surprise both parties with a decision whose *ratio decidendi* was that any imposition of this liability upon anyone (other than the patient), regardless of ability to pay, was a denial of equal protection of the law.

By its petition for rehearing, petitioner sought opportunity to argue the novel holding. The petition was denied.[49]

Petitioner reiterates that at no point during this long litigation was this issue, treated as basic by the eventual holding of the California Supreme Court, aired for discussion by either side. Petitioner maintains that this is a denial of due process.

We submit that this case comes squarely within the rule of *Saunders v. Shaw*, 244 U.S. 317 (1917). There Mr. Justice Holmes noted:

> "But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was

49. Statistics gathered from California Judicial Council's 19th Biennial Report (1963) indicates that approximately 98% of the petitions for rehearing are denied.

heard and therefore was not bound to ask a ruling or to take other precautions in advance." 244 U.S. at 320.

See also *Brinkerhoff-Faris v. Hill*, 281 U.S. 673, at p. 677 (1930) where again the dispositive issue "was not suggested by anyone in the entire litigation until the Supreme Court filed its opinion. . . ."

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Dated, San Francisco, California,
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(Appendices follow)

Appendix A

PERTINENT STATUTORY PROVISIONS

California Welfare and Institutions Code.

Article 5. Property and Support of Patients

6650. The husband, wife, father, mother, or children of a mentally ill person or inebriate, the estates of such persons, and the guardian and administrator of the estate of such mentally ill person or inebriate, shall cause him to be properly and suitably cared for and maintained, and shall pay the costs and charges of his transportation to a state institution for the mentally ill or inebriates. The husband, wife, father, mother, or children of a mentally ill person or inebriate, and the administrators of their estates, and the estate of such mentally ill person or inebriate, shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. The liability of such persons and estates shall be a joint and several liability and such liability shall exist whether the mentally ill person or inebriate has become an inmate of a state institution pursuant to the provisions of this code or pursuant to the provisions of Sections 1026, 1368, 1369, 1370, and 1372 of the Penal Code.

(Amended by Stats. 1941, Ch. 916, by Stats. 1943, Ch. 1052, by Stats. 1945, Ch. 247, and by Stats. 1947, Ch. 625.)

6651. The rate for the care, support, and maintenance of all mentally ill persons and inebriates at the state hospitals for the mentally ill where there is liability to pay for such care, support, and maintenance, shall be reviewed each fiscal year and fixed at the statewide average per capita cost of maintaining patients in all state hospitals, as determined by the Director of Mental Hygiene. The rate thus fixed shall continue in effect until a new rate is fixed. The Director of Mental Hygiene may reduce, cancel or remit the amount

to be paid by the estate or the relatives, as the case may be, liable for the care, support, and maintenance of any mentally ill person or inebriate who is a patient of a state hospital for the mentally ill, on satisfactory proof that the estate or relatives, as the case may be, are unable to pay the cost of such care, support, and maintenance or that the amount is uncollectible. In any case where there has been a payment under this section, and such payment or any part thereof should be refunded because of the death, leave of absence, or discharge of any patient of such hospital, such amount shall be paid by the hospital or the Department of Mental Hygiene to the person who made the payment upon demand, and in the statement to the Controller the amounts refunded shall be itemized and the aggregate deducted from the amount to be paid into the State Treasury, as provided by law. If any mentally ill person or inebriate dies at any time while his estate is liable for his care, support, and maintenance and other expenses at a state hospital, the claim for the amount due may be presented to the executor or administrator of his estate, and paid as a preferred claim, with the same rank in order of preference, as claims for expenses of last illness.

(Amended by Stats. 1939, Ch. 442, by Stats. 1941, Ch. 913, by Stats. 1943, Ch. 1052, by Stats. 1953, Ch. 549, by Stats. 1954, Ch. 3, by Stats. 1959, Ch. 186; and by Stats. 1961, Ch. 176.)

6653. The department shall, following the admission of a patient into a State hospital for the insane, cause an investigation to be made to determine the moneys, property, or interest in property, if any, the patient has, and whether he has a duly appointed and acting guardian to protect his property and his property interests. The department shall also make an investigation to determine whether the patient

has any relative or relatives responsible under the provisions of Section 6650 for the payment of the costs of transportation and maintenance, and shall ascertain the financial condition of such relative or relatives to determine whether in each case such relative or relatives are in fact financially able to pay such charges. All reports in connection with such investigations, together with the findings of the department, shall be records of the department, and may be inspected by interested relatives, their agents, or representatives at any time upon application.

6655. If any person committed to a State mental hospital has sufficient estate for the purpose, the guardian of his estate shall pay for his care, support, maintenance, and necessary expenses at the mental hospital to the extent of the estate. Such payment may be enforced by the order of the judge of the superior court where the guardianship proceedings are pending. On the filing of a petition therein by the department, showing that the guardian has failed, refused, or neglected to pay for such care, support, maintenance, and expenses, the court, by order, shall direct the payment by the guardian. Such order may be enforced in the same manner as are other orders of the court.

If at any time there is not sufficient money on hand in the estate of a committed person to pay the claim of a State mental hospital for his care, support, maintenance, and expenses therein, the court may, on petition of the guardian of the estate, or if the guardian fails, refuses, or neglects to apply, on the petition of the department, make an order directing the guardian to sell so much of the other personal or real property or both, of the person as is necessary to pay for the care, support, maintenance, and expenses of the person at the mental hospital. From the proceeds of such sale, the guardian shall pay the amount due for the care,

support, maintenance, and expenses at the mental hospital, and also such other charges as are allowed by law.

Payment for the care, support, maintenance, and expenses of person at a State hospital shall not be exacted, however, if there is likelihood of the patient's recovery or release from the hospital and payment will reduce his estate to such an extent that he is likely to become a burden on the community in the event of his discharge from the hospital. If a certificate from the medical superintendent of the State hospital in which the person is confined as a patient is filed in the office of the county clerk with the papers in the guardianship proceedings of the patient, in which certificate the medical superintendent states that the patient is suffering from a chronic form of insanity, and that in his opinion a recovery is beyond reasonable hope and that the patient will in all probability continue to be a charge in a State hospital until death, such certificate shall be prima facie evidence that the patient is not likely to recover or to be released from the hospital, and the guardian shall pay the amount due for his care, support, maintenance, and expenses at the hospital and such other charges as are allowed by law out of any moneys of the estate in his possession.

(Amended by Stats. 1941, Ch. 917, and by Stats. 1943, Ch. 1052.)

California Civil Code Section 1432.

A party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.

CONSTITUTION OF THE UNITED STATES

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix B

39 N.Y.U. L.Rev. 858 (1964)†

Compulsory Contribution to Support of State Mental Patients Held Deprivation of Equal Protection.*

Public mental health facilities represent one of the largest categories of state expenditures, and the amount devoted to their maintenance and expansion doubles every few years.[1] Statutes in all fifty states and the District of Columbia render one or more private individuals liable for the cost of support and care of inmates of state hospitals.[2] This

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† The permission of the editors of the New York University Law Review to print this Comment in full is gratefully acknowledged. Because this brief is being filed prior to printing of the review, we are using this means of making it available to the Court and parties.

* Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488, cert. granted, 33 U.S.L. Week 3114 (U.S. Oct. 13, 1964) (No. 111).

1. Counsel of State Governments, Book of the States, 1964-65, at 395 (1964).

2. Ala. Code tit. 45, § 257 (1959); Alaska Stat. § 47.30.270 (1962); Ariz. Rev. Stat. Ann. § 36-520 (Supp. 1963); Ark. Stat. Ann. § 59-230 (1947); Cal. Welfare & Inst'ns Code § 6650; Colo. Rev. Stat. §§ 36-10-7, 71-1-15 (1953); Conn. Gen. Stat. Ann. § 17-295 (Supp. 1963); Del. Code Ann. tit. 16, § 5127 (1953); D.C. Code Ann. § 21-318 (1961); Fla. Stat. § 394.22(13) (1961); Ga. Code Ann. § 35-1104 (1962); Hawaii Rev. Laws § 330-22 (Supp. 1963); Idaho Code Ann. § 66-354 (Supp. 1963); Ill. Ann. Stat. ch. 91½, § 9-19 (Smith-Hurd Supp. 1963); Ind. Ann. Stat. § 22-401(a) (Supp. 1963); Iowa Code Ann. § 230.15 (Supp. 1963); Kan. Gen. Stat. Ann. § 59-2006 (Supp. 1961); Ky. Rev. Stat. § 203.080 (1963); La. Civ. Code Ann. art. 119, 227 (West 1952), La. Rev. Stat. Ann. § 28:143 (1951); Me. Rev. Stat. Ann. ch. 27, § 135C (Supp. 1963); Md. Ann. Code art. 59, § 5 (Supp. 1963); Mass. Gen. Laws Ann. ch. 123, § 96 (Supp. 1963); Mich. Stat. Ann. § 14.811 (Supp. 1963); Minn. Stat. Ann. § 246.51 (Supp. 1963); Miss. Code Ann. §§ 6909-13, 7357 (1952); Mo. Ann. Stat. § 202.260 (1962); Mont. Laws 1963, ch. 213, §§ 2, 4, at 642, Mont. Rev. Codes Ann. § 71-233 to -235 (1962); Neb. Rev. Stat. § 83-352 (Supp. 1963); Nev. Rev. Stat. § 433.370 (1957); N.H. Rev. Stat. Ann. § 8:41 (1955); N.J. Stat. Ann. § 30:4-66 (1964); N.M. Stat. Ann. § 34-2-21 (1953); N.Y. Mental Hygiene Law § 24(2); N.C. Gen. Stat. § 143-121 (1964); N.D. Cent. Code § 25-09-04 (1963); Ohio Rev. Code Ann. § 5121.06 (Page

liability occasionally rests solely on the estate of the patient alone, but more commonly extends to close relatives of the inmate.[3] An example of the latter type of statute is Section 6650 of the California Welfare and Institutions Code, which provides that "the husband, wife, father, mother or children of a mentally ill person . . . shall be liable for his care, support and maintenance in a state institution of which he is an inmate." In California, the collections under this section have totalled over five and one-half million dollars annually[4]—a sum which will be reduced to zero in the future by the effect of the recent decision in *Department of Mental Hygiene v. Kirchner*.[5]

In 1953 Auguste Schaeche, the mother of Ellinor Vance, was adjudged mentally ill and committed to a state hospital. When the daughter died in 1960, the Department of Mental Hygiene brought suit against her estate under section 6650 to recover the cost of the mother's maintenance in the state hospital. The mother had a small estate of her own at that time, which the daughter's administratrix argued should first be exhausted.

Supp. 1963); Okla. Stat. Ann. tit. 43A, § 115 (1954); Ore. Rev. Stat. § 179.630 (Supp. 1963); Pa. Stat. Ann. tit. 71, § 1783 (1962); R.I. Gen. Laws Ann. §§ 26-3-17, 40-8-13 (1956); S.C. Code Ann. § 32-1029 (1962); S.D. Laws 1964, ch. 104, §§ 2, 4, at 134; Tenn. Code Ann. §§ 33-629 to -630 (Supp. 1963); Tex. Rev. Civ. Stat. Art. 3196a(2) (1952); Utah Code Ann. § 64-7-6 (1961); Vt. Stat. Ann. tit. 18, § 2685 (1959); Va. Code Ann. § 37-125.1 (Supp. 1963); Wash. Rev. Code Ann. § 71.02.230 (1962); W. Va. Code Ann. § 2672 (Supp. 1963); Wis. Stat. § 46.10 (1961); Wyo. Stat. Ann. § 25-81 (Supp. 1963).

3. Only Arizona, Florida, New Mexico and South Carolina place liability exclusively on the patient.

4. Respondent's Petition for Rehearing, app. E, Affidavit of Paul Downard, Chief, Bureau of Patient's Accounts, Department of Mental Hygiene of the State of California, Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488, cert. granted, 33 U.S.L. Week 3114 (U.S. Oct. 13, 1964) (No. 111).

5. 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488, cert. granted, 33 U.S.L. Week 3114 (U.S. Oct. 13, 1964) (No. 111).

The trial court granted the Department's motion for judgment on the pleadings. The California District Court of Appeal affirmed, holding that liability under section 6650 was absolute, not conditioned on the prior exhaustion of the assets of the incompetent's estate. The California Supreme Court reversed. The court noted that it had recently interpreted the liability imposed by section 6650 as absolute,[6] but went on to hold that section 6650 denied the named relatives the equal protection of the laws.[7] The court considered the operation of state mental institutions a proper state function, and concluded that it was therefore arbitrary to charge any class of individuals, excepting perhaps the inmate himself,[8] with the costs of maintaining such institutions.[9] Implicit in this reasoning is the proposition that a proper state function necessarily is exclusively a state function.

In finding that responsibility for the care of mental inmates rested exclusively on the state, the court cited as dispositive a 1963 decision[10] in which it had held that the state could not constitutionally impose liability for support on the father of one committed to a state hospital before

6. Id. at 719, 388 P.2d at 722, 36 Cal. Rptr. at 489.

7. The court's reliance was apparently on the equal protection clause of the United States Constitution, rather than on articles 11 and 23 of the California Constitution. The words "equal protection," which the court consistently used in its opinion, do not appear in the analogous sections of the California Constitution.

8. This exception has since been affirmed in Department of Mental Hygiene v. Schumpert, ... Cal. App. 2d ....., 39 Cal. Rptr. 698 (1964).

9. 60 Cal. 2d at 720, 388 P.2d at 722, 36 Cal. Rptr. at 490.

10. Department of Mental Hygiene v. Hawley, 59 Cal. 2d 247, 379 P.2d 22, 28 Cal. Rptr. 718 (1963).

being tried for murder.[11] It reasoned that there was no essential difference between civil and criminal commitments: both protected society from the confined person and sought his reclamation as a productive citizen. This identity of purpose called for identical judicial treatment. In addition, the court explicitly acknowledged it was affected by the "social evolution" of the last fifty years, which resulted in an expanded *parens patriae principle*.[12] The court also asserted that the state had established inconsistent legislative policies by ordering that the assets of inmates not be so depleted as to render them burdens upon the community if discharged,[13] while at the same time permitting the Department freely to tax the inmate's relatives.

Other considerations may be advanced which tend to support the wisdom of the result the court reached. Many would argue that relatives of a state mental patient ought not to be charged for his care and support, because no fault can be assigned to them for the existence of the condition which makes such care necessary. It is possible that undesirable feelings of guilt or shame may be engendered in both the relatives and the patient by an enforced assumption of responsibility for a condition for which no one is at fault. Another possibility is that relative responsibility is detrimental, rather than conducive, to an attitude of family responsibility, since the relatives may, in fact, resent the patient as an economic and social liability. Furthermore, the operation of relative-responsibility laws may involve undesirable adjunctive effects—such as the public inquiry into private financial circumstances usually re-

11. The rationale of the Hawley decision was that such a commitment is "part and parcel of the administration of the criminal law," id. at 251, 379 P.2d at 25, 28 Cal. Rptr. at 721, and private individuals cannot constitutionally be charged for costs of the detention of criminals since such detention is exclusively a state function.

12. 60 Cal. 2d at 722, 388 P.2d at 723, 36 Cal. Rptr. at 491.

13. Cal. Welfare & Inst'ns Code § 6655.

quired before a charge can be made.[14] These considerations possibly have had an effect upon recent legislative changes in California which may signify a trend toward abandonment of relative responsiblity for services rendered to individual by the state.[15] But while these considerations may help to justify the *Kirchner* result as sound social policy, a valid judicial path to that result was not articulated. In particular, it is doubtful that the *Kirchner* result can be rationalized on the basis of the equal protection clause, as that clause has thus far been interpreted.

A question of equal protection can arise whenever a law operates differently upon one segment of the body politic than upon the rest. For example, a sales tax imposes upon the class "purchasers of goods" an obligation which is different from that borne by the class "non-purchasers of goods." In such legislation, the issue of equal protection tests the constitutional validity of the particular classification made.

In considering the issue of equal protection, two general principles guide the judicial approach. The first is that a legislative distinction should be upheld if any facts can reasonably be conceived which support it.[16] The other recognizes that the states have a wide latitude in creating

14. Cf. Cal. Welfare & Inst'ns Code § 6653: "The department shall, following the admission of a patient into a State hospital . . . ascertain the financial condition of such [responsible] relatives. . . ."

15. Cal. Welfare & Inst'ns Code § 7011.5 now relieves parents of mentally deficient persons from the liability for support formerly attributed to them by § 5260. Similarly, liability of relatives for state aid to the blind under former § 3088 of the Cal. Welfare & Inst'ns Code has been removed by the new § 3011, and relatives' liability for support of the needy disabled is specifically removed by § 4011.

16. Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 137 (1921).

legislative classifications, and that only a purely arbitrary classification should be voided on equal protection grounds.[17]

A peculiarity of equal protection is that to an empirical observer of judicial results there appears to be not one doctrine, but two. Where the legislative line of discrimination complained of is based upon characteristics such as race or national origin, judicial activism has been the rule, and statutes have frequently been struck down on equal protection grounds. On the other hand, courts treating statutes which classify on other bases, such as those which distribute an economic burden unequally on different classes, have typically exercised self-restraint.[18] The decision in *Kirchner* is significant in that it strikes down a statute of the latter type.[19]

The question of equal protection is often difficult because of the internal dilemma the doctrine presents. It has been said both that "the equal protection of the laws is a pledge of the protection of equal laws,"[20] and that laws may clas-

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17. Williamson v. Lee Optical Co., 348 U.S. 483, 487-89 (1955).

18. This distinction is noted and documented in Pritchett, The American Constitution 614-17 (1959). See also McKay, Political Thickets and Crazy Quilts: Reapportionment and Equal Protection, 61 Mich. L. Rev. 645, 665-77 (1962); Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1939). Professor McKay phrases the distinction slightly differently, as between cases involving "basic civil rights of man" and those dealing with "health, morals and general welfare." McKay, supra at 666.

19. Toward the end of its opinion the court implies that any classification made solely on the basis of family relationship may be a denial of equal protection—a suggestion which would tend to place § 6650 in the same light as statutes classifying on the prohibited basis of race. The point is not seriously pursued, however, being entirely extraneous to the court's main argument, which treats section 6650 as a statute of the second type mentioned in text. In addition, the cases relied on by the court are entirely inadequate to support the proposition that family relationship is a forbidden basis of classification. See Note, 49 Cornell L.Q. 516 n.2 (1964).

20. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

sify.[21] A law which classifies is, however, a law unequal in its effects. Confusion has therefore resulted, even at the highest judicial levels. For example, in the past courts have held that a classification must be drawn along "natural" lines,[22] but recent Supreme Court decisions are incompatible with this limited approach. Nor is the vague statement that the legislative classification must be "reasonable" of any use as a test of equal protection without further guidance as to what distinguishes a reasonable classification from an unreasonable one.

It is in fact extremely doubtful whether any clear formula now exists for determining the equal protection issue in cases of legislative classification for economic and social purposes. In *Morey v. Doud*,[23] however, the Supreme Court progressed toward a workable definition of the standard of equal protection by consolidating and clarifying several earlier decisions. In that case, an Illinois statute imposed licensing requirements on any firm selling money orders in Illinois, but specifically excepted the American Express Company. The Supreme Court ruled that statutory classifications must be drawn along lines which could appear to a reasonable man to be logically related to the purpose of the law itself.[24] The purpose of the Illinois statute, the Court found, was to provide continuing protection to citizens against sellers of money orders who might be of questionable integrity or solvency.[25] The Court held five-to-four

21. "Special burdens are often necessary for general benefits." Barbier v. Connolly, 113 U.S. 27, 31 (1885).

22. E.g., Pacific Express Co. v. Seibert, 142 U.S. 339, 354 (1892).

23. 354 U.S. 457 (1957).

24. Id. at 466.

25. Ibid.

that the classification made between American Express and all other sellers was not reasonably related to this purpose because there was no reason to believe that the superior financial position of American Express could not be equalled by another company.

Three steps therefore seem necessary to a complete judicial analysis of an equal protection problem. The first is to define the purpose of the law under question. Exactly how this purpose is to be determined for use in the equal protection analysis is unclear from the decisions. But if the purpose of a statute is viewed as a fact, it would seem that since courts must search for any reasonably conceivable set of facts which will serve to justify a legislative distinction, courts must also search for any reasonably imaginable purpose which supports the distinction. The second step is to define the classification which is established by the statute; this should be evident from the statute itself. The final step is to determine the validity of the classification by considering the purpose and the classification together: is there any reasonable relation between purpose and classification? Here, there would seem to exist the greatest opportunity for judicial difference of opinion; yet the possibility of caprice is considerably less than under the sweeping inquiry, "is the classification reasonable?"

That the foregoing analysis of equal protection was applied in *Kirchner* seems unlikely. Despite the court's language, there is serious doubt whether the decision turned on a question of equal protection at all. A distinction exists between questioning the validity of a particular legislative classification. Clearly an equal protection issue, and questioning the power of the legislature to make *any* classification, arguably not a part of equal protection proper.[26] The

26. See Tussman & tenBrock, supra note 18, at 353-55.

obvious purpose of section 6650 is to obtain funds to help maintain state mental institutions. The classification it made was apparent. But rather than proceeding to consider the relation of the purpose to the classification—the equal protection question—the court found that the purpose was invalid: no law could impose private liability for support of mental patients in state institutions.

So restrictive a view of the legislative power in this area is most unusual. Since 1601, English and American legislatures have provided for private contribution to help sustain the burden of supporting state charges.[27] A great majority of the states presently impose liability for support upon relatives of mental inmates, and no prior decision has been disclosed which denied the states' power to do so.

If the court's conclusion that only the state as a whole may be charged with the support of inmates is unusual, the argument used to reach that conclusion seems even more so under close examination. The court's contention that civil and criminal commitments are alike in nature and purpose presumes that the main purpose of a civil commitment is to protect the rest of society—a view of psychiatric medicine which now seems anachronistic. No longer are the mentally ill locked up in houses of bedlam primarily to protect the rest of society from irksome interferences; the "principal purpose" of hospitalization of the mentally ill, as was recognized long ago by the California court, "is to care for the indigent insane, who in some cases may be successfully treated . . . ."[28] The primary beneficiary under modern psychiatric practice is the patient and his family; society benefits only in a far more restricted sense—from the

27. See 43 Eliz. 1, ch. 2 (1601), for the earliest example.

28. State Comm'r in Lunacy v. Eldridge, 7 Cal. App. 298, 305, 94 Pac. 597, 599 (1908).

possibility that successful treatment will result in the inmate's return as a productive citizen.

The court also alluded to the "expanded . . . *parens patriae* principle,"[29] to support its conclusion that the maintenance of state inmates is exclusively a state function. Yet the present breadth of the concept of social responsibility contradicts the court. All fifty states adhere to the policy of requiring private contribution. While it might be the court's view that this legislative policy ought to be changed, it can hardly expect to gain valid support for that view simply by invoking the name of equal protection. "A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state, or of *laissez faire* . . ."[30]

Thus the validity of the reasoning used by the court to reach the conclusion that support of state inmates is exclusively a state function is seriously in doubt—and so, therefore, is the further conclusion that the legislature lacks power to place liability for such support on any class less than the whole body politic. Yet, while asserting that lack of power, the court also made an exception which creates an apparent inconsistency: the inmate himself, it appears, may be charged for the cost of his care.[31] However in accord with common notions of justice this exception may be, if support of state inmates is not exclusively a state function, if there is to be an exception, then it should be explained why another attempted exception may not also be allowed. This unanswered question is the crux of the true equal protection issue in the case.

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29. 60 Cal. 2d at 722, 388 P.2d at 723, 36 Cal. Rptr. at 491.

30. Lochner v. New York, 198 U.S. 45, 75-76 (1905) (dissenting opinion of Holmes, J.).

31. See note 8 supra and accompanying text.

The most obvious purpose of section 6650 is reimbursement for the costs of maintaining state mental institutions.[32] The statute singles out a class to bear this burden, consisting of the inmate, his spouse, his parents and his children. Does this classification bear "any reasonable relation to the purpose?" The precise requirements of this "reasonable relation" have not been judicially defined; it is uncertain exactly what type of links must exist between the purpose of a statute and its classification, in order to satisfy the demands of equal protection. Yet three factors in the *Kirchner* case may be identified—causation, benefit and moral duty—which appear to be relevant to the constitutional requirement.

The most important necessary link would seem to be that of causation: is the legislative classification reasonably designed to accomplish the desired purpose?[33] If reimbursement is the purpose of section 6650, then placing liability on the class of relatives named therein would certainly accomplish the purpose—but so would placing liability on any class of persons. The existence of this causal connection alone, therefore, does not distinguish the particular classification made as valid, compared with any other possible classification. It does not seem likely, for instance, that a legislative attempt to place liability for the care of mental inmates only on red-headed men would survive an equal protection challenge. Thus the necessary "reasonable rela-

32. See Acting Comm'r of Mental Health v. Williamson, 330 Mass. 52, 54, 110 N.E. 2d 916, 917 (1953).

33. A clear example of causation as the determinative element of the relationship between classification and purpose is Railway Express Agency v. New York, 336 U.S. 106 (1949), where the Court addressed itself to the question whether increased driver vigilance might reasonably be expected to result from a city ordinance restricting the kinds of advertisements to be carried on the sides of trucks.

tion" between purpose and classification must contain additional elements.

When a class of persons has benefited from state activities, and the legislature seeks by statute to assess a portion of the community for a share of the cost of those activities, it seems reasonable that the state should assess the class which has benefited most. If benefit is a valid element of the "reasonable relation" necessary to satisfy equal protection, then section 6650 again seems to meet the constitutional requirement. Because of their emotional and social involvement, close relatives of a mentally ill person are the class most likely to be benefited by relief from anxiety and financial strain, when the state assumes care of the patient. In this respect, then, the classification made in section 6650 bears a different and more reasonable relationship to its purpose than other classifications.

Finally, if particular persons have a common law or a strong moral duty to act in a way which would accomplish the purpose sought by the legislature, then it may be reasonable to impose a statutory duty identical with their common law or moral duty.[34] In this instance also, the classifications may justifiably be said to bear a reasonable relation to the legislative purpose. The conclusion which seems inescapable is that the legal theory upon which the California court explicitly relied does not support its reasoning.

The imposition of liability for the care of inmates of state mental institutions is a nationwide practice. Statutes in forty-two states *create* liabilities upon persons who would otherwise have no legal duty to support the inmate. The rest apparently make clear that persons otherwise obligated to support an incompetent are not relieved of that duty

34. The existence of this moral duty was of the essence in the court's opinion in Beach v. District of Columbia, 320 F.2d 790 (D.C. Cir. 1963), which upheld a statute very similar to § 6650.

merely because of the incompetent's commitment to a state hospital.[35] The *Kirchner* court's reasoning would invalidate all similar liabilities created in relatives by statute,[36] and would cast serious doubt on the pre-existing common-law duties of support when applied to contributions for the maintenance of a state mental patient. The entire burden of maintaining state mental institutions, less whatever amount might be recoverable from the estates of inmates themselves, would be thrown upon the general tax structure of the states, already loaded to capacity in some instances.[37] Furthermore, other welfare statutes which commonly require contribution from relatives for such programs as state welfare payments to indigents[38] and medical assistance to the aged[39] would be invalidated if courts began to denote these various functions as belonging exclusively to the state as a whole.

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35. The statutes in Georgia, Louisiana, Missouri, Virginia and Wisconsin seem only to reaffirm the liability of those persons, such as husbands or parents of a minor child, who would normally be legally responsible for the care of the patient if he were not in a state hospital. Disregarding Arizona, Florida, New Mexico and South Carolina, which impose liability on the inmate only (see note 3 supra), the remaining 41 states and the District of Columbia impose liability on persons not otherwise responsible, such as children of an inmate.

36. The close attention being paid to the final outcome of Kirchner in other jurisdictions is explicit in a recent interlocutory ruling by the New Jersey Supreme Court, which remanded a similar case for trial "of the important constitutional . . . questions dealt with in Department of Mental Hygiene v. Kirchner." Pennhurst State School v. Goodhartz, 42 N.J. 266, 200 A.2d 112 (1964).

37. See Mernitz, Private Responsibility for the Costs of Care in Public Mental Institutions, 36 Ind. L.J. 443, 444 (1961).

38. E.g., N.Y. Code Crim. Proc. § 914.

39. E.g., N.Y. Soc. Welfare Law § 252.